SUBJECT INDEX

	Page
Issue	1
Statement	2
Reasons for Denying the Writ	4
Conclusion	6

LIST OF AUTHORITIES

CASES

	Page
Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd., 369 U.S. 355 (1962)	4
Harris v. Pennsylvania Railroad, 361 U.S. 15 (1959)	4
Jefferson v. Taiyo Katun K.K., 310 F.2d 528 (1962), cert. den. 372 U.S. 967	5, 6
Logan v. Empresa Lineas Maritimas Argentinas, 353 F.2d 373, cert. den. 383 U.S. 980	5
Mitchell v. Trawler Racer, Inc., 362 U.S. 539 (1960)	4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

NO. 360

MITSUBISHI SHIPPING COMPANY, *Petitioner*

v.

LOUIS MILLS, *Respondent*

RESPONDENT'S REPLY TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

To The Honorable The Chief Justice and the Associate Justices of the Supreme Court of the United States:

Respondent prays that petitioner's petition for writ of certiorari be denied forthwith.

ISSUE

Did the Court of Appeals for the Fifth Circuit correctly hold that the defective winch was unseaworthy as a matter of law?

STATEMENT

Petitioner's Petition for Writ of Certiorari simply misses the point, and refuses to come to grips with the only issue in this case.

The Court below held, after reviewing all of the evidence, that the uncontradicted testimony established that the winch was defective, making a "classic case of unseaworthiness".[1]

The total failure of Petitioner to attack the finding by the Court below that the winch was defective or to demonstrate that the record contains evidence that the winch was not defective stands out like a sore thumb.[2]

As in the Court of Civil Appeals, Petitioner has chosen instead to hammer at the confusion in the testimony of

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[1] ". . . Gardner found a cotter key. Within a short time a work party from the ship's crew began working on the winch. By use of heavy hammers and other tools, this key was re-seated. However it came out again and the repair crew redid the job. **All of this we regard as established beyond question.** The most that can be read into the deposition testimony of the Japanese Master, chief officer and third mate is that they had no recollection of any such occurrence being reported or repair work being done."

"We think that the **uncontradicted** testimony showing the missing key, the replacement of it, the malfunction when it slipped out again, the second replacement of the key, and the untoward operation of the winch thereafter all adds up to **failure from an identifiable cause of ship's gear during normal expected operations** . . ."

"This is the classic case of unseaworthiness . . ."
(Emphasis ours) (From opinion by Circuit Judge Brown, pps. 18-19 of Petitioner's Petition).

[2] Petitioner has erroneously asserted from the beginning that proof of a defective winch does not establish unseaworthiness as a matter of law.

Petitioner's memorandum brief states: "The mere fact that it occurred (referring to the pin coming out of the winch) is not sufficient to render the vessel unseaworthy." (Interpolation supplied by this writer).

Mills, a Negro longshoreman, (R. 44)[3] in the description of the winch, which is irrelevant on the issue of whether the winch was defective, and assails bitterly the Court of Appeals for finding any value or use in the photographs sponsored and introduced by Petitioner.[4]

This contention is a red herring. Petitioner wanted the photographs in evidence to illustrate the winch in question. The trial Judge believed the photographs were relevant for illustrative purposes; otherwise, the photograph would have been excluded. Because the Court of Civil Appeals accepted Petitioner's offer that the photographs correctly illustrated the type of winch that injured Mills, Petitioner now seeks to disown and renounce its own

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[3] Obviously, Mills, a Negro longshoreman, was no match in the able and skilled cross-examination by counsel of petitioner, as pointed out by Mill's counsel at the time. (R. 159-160)

[4] "Q. Would you state your name, please, sir?
A. Yoshihito Takagi." (R. 372) * * *
"Q. Mr. Takagi, were you the third officer on the Virginia Maru on or about November 30, 1961?
A. Yes. (R. 374)
* * *
"Q. How long had you been aboard the Virginia Maru as of November 30, 1961?
A. Approximately three months."
"Q. As third officer of the Virginia Maru, were you familiar with the winches at the No. 5 hatch of that vessel and the No. 5 hatch?
A. Not completely familiar with it." (R. 374-375)
* * *
"Q. Can you identify those pictures as being pictures of the starboard winch at the No. 5 hatch on board the Virginia Maru as it existed on or about November 30 of 1961?
A. **I think so.**" (emphasis supplied) (R. 376).
Petitioner offered the photographs in evidence (R. 378) and after objection by respondent's counsel, petitioner made the following offer.
"Mr. McKinney: Then I offer it for the limited purpose of illustration." (R. 379).

proffered photographs. Such photographs did not, as Petitioner says, prevent cross examination of, or make the photographs less valuable because of the "squirmings, perspirings and evasiveness" by "respondent and his friends." Petitioner even conceded during the trial that all you can do with a picture is obtain a concession that the winch in the picture looks like the winch in question.[5]

REASONS FOR DENYING THE WRIT

1. This case really is very simple. The law of the case is elementary. The decision in the final analysis rests on a review of all the evidence. If all the evidence establishes that the winch was defective, as held by the Court below, the writ should be denied. We submit that this is the only conclusion that can be reached after a review of all the evidence. The opinion by Circuit Judge Brown, a recognized authority in the law of admiralty, sets forth with more clarity, conciseness and skill the undisputed testimony establishing a "classic case of unseaworthiness" because of a defective winch than can this writer. In such cases, upsetting a jury finding of seaworthiness does not result "in a collision with The Seventh Amendment".

2. The decision in this case does not conflict with either *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U.S. 355 (1962) or *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539 (1960). These contentions by Petitioner were answered in the Court of Civil Appeals opinion (pp. 20-22, Petitioner's Petition).

3. This decision is in harmony with *Harris v. Pennsylvania Railroad*, 361 U.S. 15 (1959), which recites three

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[5] "Mr. McKinney: I concede that he did not say any of these was the winch, but this appears like it and that's all you can do with a picture."

recent decisions where this Court granted writ and sustained the lower court for taking the case from the jury, setting aside a jury verdict for the employee and ordering a new trial, or rendering judgment for the employer.[6]

4. Frankly, I like Petitioner's assertion that "What's sauce for the goose is sauce for the gander". Now, I have been both goose and gander.

5. This decision is not in conflict with *Logan v. Empresa Lineas Maritimas Argentinas,* 353 F.2d 373 cert. den. 383 U.S. 970, as urged by Petitioner. Logan contended "that the vessel was unseaworthy because the hatch board was short. However, there was testimony, as indicated above, that right after the accident the hatch board was examined, measured, and found not to be short but to fit tightly in place" (p. 377). Thus, the facts were in dispute, and in such cases, we agree that it would be error to rule for or against the longshoreman as a matter of law.

6. The Court's opinion in this case is not in conflict with *Jefferson v. Taiyo Katun K. K.*, 310 F.2d 528 (1962), cert. den. 372 U.S. 967. The opinion in *Jefferson, supra,* is not difficult to understand. It held that the appellate court can not find unseaworthiness as a matter of law in the face of a jury finding of seaworthiness which is supported by some evidence. We have no quarrel with this declaration. However, in *Jefferson,* the Court recognized that there are cases where the issue of unseaworthiness as the proximate cause of an injury may be resolved against a ship owner as a matter of law. We agree with this legal

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[6] The opinion in **Harris shows** additional harmony—and not conflict—in its catalogue of 27 cases, where this Court denied certiorari in situations where the lower court ruled as a matter of law by withholding the case from the jury or overturning a jury verdict for employee and rendering judgment for the employer.

principle. The Court held in *Jefferson,* after reviewing all the evidence, that the issue of unseaworthiness could not be resolved either for or against the ship owner as a matter of law.

The Court below held, after a review of all the evidence, that this was one of those cases, "rare or not", where the issue of unseaworthiness as the proximate cause of an injury should be resolved against the ship owner as a matter of law.

7. Petitioner's assertion that "the facts stated in the opinion plainly contradict the record in the trial court" is incorrect. This broad swipe by Petitoner is allegedly supported by Appendix B. An examination of Appendix B reveals that Petitioner lets us off where we got on—at Petitioner's dissertation about photographs. Petitioner's statement about photographs in footnote 6, supra, is the best answer to its own contention.

CONCLUSION

For the foregoing reasons, Petitioner's Petition for Writ of Certiorari should be promptly denied.

Respectfully submitted,

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September 13, 1966